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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 306.

JOHN N. CRUDUP

vs.

THE STATE OF GEORGIA.

BRIEF

In Opposition to Grant of Writ of Certiorari to the Supreme Court of Georgia.

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INDEX.

	Page
Opinions below	1
Statement of the case	2
Reasons for denial of writ of certiorari	5
I. Timely filing	5
II. The question is moot	7
III. Failure of compliance with rules of the United States Supreme Court	9
IV. Cases distinguished	11
Conclusion	16
Appendix—Opinions of Georgia Court of Appeals and Supreme Court of Georgia	19

Cases Cited

Bently v. Anderson-McGriff Hardware Co., 181 Ga. 813 (1), 184 S. E. 297	10
Bergdoll et al. v. United States, 3rd Cir. 1922, 279 F. 404, denied certiorari, 259 U. S. 585, 42 Sup. Ct. 589, 66 L. ed. 1076	7
Bradford Electric Light Co., Inc., v. Clapper, N. H. 1931, 52 Sup. Ct. 118, 284 U. S. 221, 76 L. ed. 135	7
Brown v. State, 114 Ga. 60 (2), 39 S. E. 873	10
Brown v. Vermont, 365 U. S. 822, 81 Sup. Ct. 706, 5 L. ed. 2d 699	6
Calhoun v. State, 211 Ga. 112, 84 S. E. 2d 198	10
Citizens Bank v. Opperman, Ind. 1919, 39 Sup. Ct. 330, 249 U. S. 448, 63 L. ed. 701	7
Crudup v. State of Georgia, 106 Ga. App. 833, 835	2

Fisher v. Pace, 69 Sup. Ct. 425, 336 U. S. 155 15

Georgia and Florida Ry. v. Newton, 140 Ga. 463 (3), 79 S. E. 142 10

In re McConnell, 8 L. ed. 2d 434 ..... 11, 12

Lott v. United States, 280 F. 2d 24 6

Parker v. People of State of Illinois, Ill. 1948, 68 Sup. Ct. 708, 333 U. S. 571, 92 L. ed. 886, rehearing denied 68 Sup. Ct. 1014, 334 U. S. 813, 92 L. ed. 1744, petition denied 69 Sup. Ct. 123, 335 U. S. 856, 93 L. ed. 403 7

Re Green, 369 U. S. 689, 8 L. ed. 198, 82 Sup. Ct. 1114 13

Rust Land and Lumber Company, Plaintiff in Error, v. Ed Jackson, Will Scott, J. F. Nichol, A. C. Coleman, Zanders Parker and Isom White, 250 U. S. 850 6

St. Pierre v. United States, 319 U. S. 40, 41, 87 L. ed. 1199 8

State of Georgia v. Marion Smith, 107 Ga. App. 243 ... 2

Stembridge v. Georgia, 343 U. S. 541, 96 L. ed. 1130 ... 9

United States ex rel. Frank Brown v. Smith, Warden, Vermont State Prison, 200 F. Supp. 885, 925 6

United States v. Alaska S. S. Co., 253 U. S. 113, 115, 116, 64 L. ed. 808, 809, 810, 40 Sup. Ct. 448 8

West v. Frick Co., 183 Ga. 182, 187 S. E. 868 10

Williams v. State, 210 Ga. 665, 82 S. E. 2d 216, cause remanded 349 U. S. 375, 75 S. C. 814, 99 L. ed. 1161, adhered to 211 Ga. 763, 88 S. E. 2d 376, certiorari denied 250 U. S. 950, 76 S. C. 326, 100 L. ed. 828, rehearing denied 350 U. S. 977, 76 S. C. 443, 100 L. ed. 847 11

Wood v. Georgia, 370 U. S. 375, 8 L. ed. 2d 569, 82 Sup. Ct. 1364 ..... 14, 15

Statutes and Rules Cited.

Georgia Code, § 24-105 12
Georgia Code, § 24-3323 12
Rules of the Supreme Court of the United States:
Rule 22 ..... 5, 6
Rule 23.1 9
Rule 38½ 6
18 U. S. C., § 101 12

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BRIEF

In Opposition to Grant of Writ of Certiorari to the Supreme Court of Georgia.

To: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Your Respondent, the State of Georgia, respectfully prays that the writ of certiorari be denied as prayed for by Petitioner, John N. Crudup.

OPINIONS BELOW.

The Opinion of the Georgia Court of Appeals is reported in 106 Ga. App. 833. The Opinions of the Supreme Court of Georgia is reported in 218 Ga. 819, and both Opinions are reprinted in the Appendix hereto.

STATEMENT OF THE CASE.

On the 23rd day of February, 1962, in the City Court of Hall County, Georgia, before the Honorable Joseph H. Blackshear, Judge of said Court, there came on for trial the case of the **State of Georgia v. Marion Smith**, 107 Ga. App. 243, this being a criminal accusation wherein the said Marion Smith was accused of the offense of driving an automobile while under the influence of intoxicants. The defendant Marion Smith was represented at said trial by the petitioner, John N. Crudup.

During the progress of the trial, and immediately after the State rested its case, John N. Crudup, the defendant's attorney, as stated in **Crudup v. State of Georgia**, 106 Ga. App. 833, 835,

> ". . . 'then called to a court bailiff to bring in Deputy Sheriff Fuller. The court inquired of attorney Crudup if he overlooked something when witness Fuller was on the witness stand and attorney Crudup stated that he wanted to recall witness Fuller and ask him if he didn't testify that a woman was in the car with the defendant at the time of the occurrence. The court **ruled** that witness Fuller could not be recalled for such further cross-examination and that the jury would know what he testified but the witness could be called as a witness for the defendant. Attorney Crudup **stated** he did not want to call witness Fuller as a witness for the defendant but wanted to recall him about his testimony while on the stand. The court **again ruled** that witness Fuller could not be recalled for the purpose stated and **directed attorney Crudup to proceed with his defense and call some other witness.** Attorney Crudup **stated** he had no other witness except the defendant would make

a statement but that he wanted to put the witness Fuller back on the stand. The court **again stated** to attorney Crudup that he could call witness Fuller to the stand to testify as a witness for the defendant but could not recall him for further cross-examination to ask him what he testified to earlier in the trial. Attorney Crudup then **again stated** he did not want to call witness Fuller as a witness for the defendant but persisted in his request to recall him for cross-examination as to his testimony given earlier in the trial and if he didn't testify that a woman was in the car at the time of the occurrence.'" "(Emphasis supplied.)" "'At this point the court asked attorney John N. Crudup if he had any reason to give why he should not be punished for contempt of the court **in failing and refusing to abide by the rulings of the court** that the witness could not be recalled for the purposes he was insisting on. Attorney John N. Crudup thereupon replied to the court that he was not in contempt of the court. Attorney John N. Crudup having thus **failed and refused to abide by the rulings of the court** that witness Fuller could not be recalled for further cross-examination regarding matters to which he had or had not testified earlier in the case, and **having refused to abide by the court's ruling** that the jury would remember the evidence, and attorney John N. Crudup **having persisted repeatedly in refusing to abide by the rulings of the court** and insisting on recalling the witness for the purposes aforesaid, and the attorney's conduct being repeated and the attorney John N. Crudup having failed and refused to purge the contempt after opportunity to do so, and said attorney having stated to the court that he was not in contempt after having been so adjudged, the court now in the exercise of a sound judicial discretion does consider, order, and

adjudge that John N. Grudup an attorney at law, has wilfully and intentionally conducted himself in contempt of the court and in defiance of the court, and that it is necessary in order to carry on the administration of justice, preserve **order and decorum** in the court and **to enforce due respect** to the court's orders and rulings . . . . (Emphasis supplied)."

The statement of the case by petitioner is incorrect where he states:

> "Petitioner then stated to the court that he did not want to call said witness as his client's witness inasmuch as he had no witnesses to offer and did not wish to forfeit his right to the concluding argument by making this witness as witness for the defendant" (Petitioner's Brief, page 4, second paragraph),

in that such statement is not in the record of this case.

The time sequence as to the statement by the Solicitor is incorrect in that the statement of the Solicitor as to what the witness had testified occurred prior to the State resting its case and prior to the attempt by the petitioner to recall the witness.

The petitioner was given ample opportunity to show why he should not be adjudged in contempt of court and to be fully heard thereon and to purge himself of contempt committed in an open public trial. Petitioner refused to speak in explanation, mitigation or extenuation of his contemptuous conduct, but stubbornly and defiantly spoke in resentment and defiance of the court by arguing that he was not in contempt of court.

REASONS FOR DENIAL OF WRIT OF CERTIORARI.

I

TIMELY FILING.

Petition was not timely filed as required by Rule 22 of the Supreme Court of the United States in that the date of filing was ten (10) days after expiration of time allowed.

Petitioner, in his motion for stay, presented to Justice Hugo L. Black, stated:

> "The plaintiff in error will, within the time provided by law, to wit: ninety days from the date of the denial of the motion for rehearing in the Supreme Court of Georgia (Rule 38) of the Supreme Court of the United States and 28 U. S. C. A. 1101[c]), file his petition for writ of certiorari in the Supreme Court of the United States." (Page 5, paragraph 2 of said motion to stay enforcement of judgment of Supreme Court of Georgia.)

The order of stay, as executed by Justice Black on May 4, 1963, provided:

> "... stayed providing a petition for certiorari is filed within the statutory time."

Petition for rehearing was denied by the Georgia Supreme Court on April 16, 1963, and the time for filing the writ of certiorari expired July 15, 1963, as provided by Rule 22, Supreme Court of the United States, which provides that a writ of certiorari will be deemed timely if filed within ninety (90) days after the entry of the judgment sought to be reviewed.

The petition for writ of certiorari was filed July 25, 1963, ten (10) days after the expiration of the time allowed by the Rules of this Court for the filing of same.

Rule 22.1 of the Supreme Court of the United States, provides:

> "A petition for writ of certiorari to review the judgment of a State Court of last resort in a criminal case shall be deemed in time when it and the certified record required by Rule 21 are filed with the Clerk within ninety days after the entry of such judgment."

The wording of this Rule, being essentially the same as that found in Rule 38½ of the Rules of the Supreme Court prior to July 1, 1954, has been consistently followed by this Court.

Rust Land and Lumber Company, Plaintiff in Error v. Ed Jackson, Will Scott, J. F. Nichol, A. C. Coleman, Zanders Parker, and Isom White, 250 U. S. 850, held:

> "... on the eve of the argument a writ of certiorari was applied for; but as this was long after the expiration of the three months limited by Section 6 of the Act of September 6, 1916, the application cannot be entertained, irrespective of whether the record shows a proper case for the allowance of that writ."

See also **United States ex rel. Frank. Brown v. Smith, Warden, Vermont State Prison**, 200 F. Supp. 885, 925; and **Brown v. Vermont**, 365 U. S. 822, 81 Sup. Ct. 706, 5 L. ed. 2d 699.

The Court, in **Lott v. United States**, 280 F. 2d 24, in its discussion of timely filing, said:

> "... we are not authorized to dispense with the rules that govern our jurisdiction. On the contrary, we are expressly prohibited from extending the time for taking appeals."

Petition for certiorari filed August 15, 1947, was not timely if it challenged contempt order review of which was denied by the State Supreme Court on January 23, 1945. **Parker v. People of State of Illinois**, Ill. 1948, 68 Sup. Ct. 708, 333 U. S. 571, 92 L. ed. 886, rehearing denied 68 Sup. Ct. 1014, 334 U. S. 813, 92 L. ed. 1744, petition denied 69 Sup. Ct. 123, 335 U. S. 856, 93 L. ed. 403. Application for certiorari must be made within time limited. **Bradford Electric Light Co., Inc. v. Clapper**, N. H. 1931, 52 Sup. Ct. 118, 284 U. S. 221, 76 L. ed. 135. A writ of certiorari from the Supreme Court to a State Court was expressly forbidden by former section 350 of this title unless duly applied for within three months after the entry of the judgment or decree sought to be reviewed. **Citizens Bank v. Opperman**, Ind. 1919, 39 Sup. Ct. 330, 249 U. S. 448, 63 L. ed. 701.

II.

THE QUESTION IS MOOT.

The petitioner having paid the fine imposed and not being subject to further penalties or disabilities because of sentence, the question is moot.

On July 25, 1963, the petitioner filed a written petition with the trial court asking to be allowed to pay the fine imposed upon him on February 23, 1962, and on the same date the trial court entered an order allowing payment of the fine and on the same date the ten-dollar ($10.00) fine was paid by the petitioner. (Application to trial court, said court's order and the certificate of the Clerk thereon are reprinted in the Appendix hereto.)

It was held in **Bergdoll et al. v. United States**, 3rd Cir. 1922, 279 F. 404, in which this Court denied certiorari, 259 U. S. 585, 42 Sup. Ct. 589, 66 L. ed. 1076:

"Where a lawful sentence of fine and imprisonment was imposed on defendant, with a proviso that on payment of the fine before close of the term the sentence of imprisonment would be remitted, and defendant, after obtaining a writ of error and supersedeas, paid the fine before close of the term, such action held to require dismissal of the writ of error, since it deprived the appellate court of power to reverse the judgment, which had been satisfied, and grant a new trial for the same offense."

This Court in **St. Pierre v. United States**, 319 U. S. 40, 41, 87 L. ed. 1129, said:

"1. The service of a sentence for contempt of court in refusing to answer a question renders the case moot and so not a proper subject for review by the Supreme Court, even though the contemnor may again be asked to testify and punished for refusal to do so, and through his unreversed conviction may constitute a moral stigma.

"2. A Federal Court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it."

See **United States v. Alaska S. S. Co.**, 253 U. S. 113, 115, 116, 64 L. ed. 808, 809, 810, 40 Sup. Ct. 448.

The petitioner not being subject, under either state or federal law, to further penalties or disabilities being imposed on him as a result of the judgment which has now been satisfied, the cause is moot. The moral stigma, if there be any stigma attached, of a judgment which no longer affects legal rights does not present a case or controversy for appellate review. (See **St. Pierre v. United States**, supra.)

III.

FAILURE OF COMPLIANCE WITH RULES OF THE UNITED STATES SUPREME COURT.

Petitioner does not, in compliance with Rule 23.1 (F), specify the stage in the proceedings in the court of first instance and in appellate court, at which time, and means by which, the federal question sought to be reviewed was raised; the method of raising them; and the way in which they were passed upon by the court, ". . . as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

As a matter of fact, the record shows the petitioner did not at any stage of the proceeding, either in the trial court or in the appellate courts, raise or attempt to raise any substantial federal question, and no such question was passed upon by the trial court or either of the Georgia appellate courts.

In **Stembridge v. Georgia**, 343 U. S. 541, 96 L. Ed. 1130, this Court said:

> "1. Where the highest court of the State in which a decision could be had was not asked to pass upon and did not pass upon an order of a lower court amending the record to show that it had in fact decided a federal question, the Supreme Court of the United States has no occasion to consider the effect of the order.
>
> "2. A state appellate court requirement of definiteness in raising a question of violation of constitutional right is not met by a petition to such court for certiorari alleging that the judgment and decision of the court below, in failing and refusing to decide

applicant's case in accordance with the provisions of the State Constitution, also violates the due process and equal protection provision of the State Constitution and the Fourteenth Amendment to the Federal Constitution."

In discussing this headnote, 96 L. ed., at page 1133, Mr. Justice Minton had this to say:

"It is apparent from the record that the Supreme Court of Georgia took no action upon the question of federal constitutional rights raised for the first time on the motion for rehearing in the Court of Appeals. This was in accord with its rule that constitutional questions must first be raised in the trial court. **Beckman v. Atlantic Ref. Co.**, 181 Ga. 456, 182 S. E. 595. The attempt to raise the question of constitutional rights in the general terms of the above quotation from the petition for certiorari did not begin to meet the requirement of the Supreme Court of Georgia for definiteness. **Persons v. Lea**, 207 Ga. 384, 61 S. E. 2d 832."

"3. . . .

"4. . . .

"5 The Supreme Court of the United States is without jurisdiction to review a judgment of a state court when the existence of an adequate state ground is debatable."

That a constitutional question may not be raised for the first time in a motion for new trial is too well settled to be seriously questioned. **Brown v. State**, 114 Ga. 60 (2), 39 S. E. 873; **Georgia and Florida Ry. v. Newton** 140 Ga. 463 (3), 79 S. E. 142; **Bently v. Anderson-McGriff Hardware Co.**, 181 Ga. 813 (1), 184 S. E. 297; **West v. Frick Co.**, 183 Ga. 182, 187 S. E. 868; **Calhoun v. State**, 211 Ga. 112, 84 S. E. 2d 198.

It is apparent from the face of the motion for new trial that the defendant made no effort whatever to raise the question during the trial of the case and he cannot be heard to raise it now. See **Williams v. State**, 210 Ga. 665, 82 S. E. 2d 216, cause remanded, 349 U. S. 375, 75 S. C. 814; 99 L. ed. 1161, adhered to, 211 Ga. 763, 88 S. E. 2d 376, certiorari denied, 250 U. S. 950; 76 S. C. 326, 100 L. ed. 828; rehearing denied, 350 U. S. 977, 76 S. C. 443, 100 L. ed. 847.

IV.

CASES DISTINGUISHED.

The decisions of this Court cited and relied upon by the petitioner as being contrary to the holding of the Georgia appellate courts are clearly distinguishable from the case at bar.

In Re McConnell, 8 L. ed. 2d 434, decided by the United States Supreme Court June 18, 1962, must be distinguished from the case sub judice in that:

The Federal Courts have no statute similar to Georgia Code, § 24-3323, which provides:

> "No attorney shall ever attempt to argue or explain a case, after having been fully heard, and the opinion of the court has been pronounced, on pain of being considered in contempt."

Petitioner, not once, but for the fourth time, repeated a demand to recall a witness whom he had thoroughly cross-examined, to ask him if he had not testified to a wholly irrelevant matter, after the court had **three** times ruled that the witness could not be recalled for the purposes stated, and had **directed** him to proceed with the trial and call some other witness.

The contempt in **In Re McConnell**, supra, was based upon the alleged improper language of the attorney as being an actual obstruction of justice. The contempt sub judice was based upon the defiance and contemptuous disregard of the court's rulings and orders.

It is clear from **In Re McConnell** that the inferior Federal Courts, as distinguished from Georgia Courts of Record, are limited in contempt cases. The statute involved in the **McConnell** case is 18 U. S. C., § 401, which provides:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, **and none other**, as
>
> "(1) Misbehavior of any person in its presence or so near thereto as to **obstruct the administration of justice**. . . ." (Emphasis added.)"

In addition to this provision of the United States Code set out above, the Georgia Code, § 24-105, follows this language with:

> ". . . the misbehavior of any of the officers of said court in their official transactions, and the **disobedience** or **resistance** by **any officer of said court**, party, juror, witness, or other person, or persons to any lawful writ, process, **order, rule**, decree or command of the said court. (Emphasis supplied.)"

In the case sub judice, the contempt was conduct by the petitioner such as to be in complete disregard of Georgia Code, § 24-105, and more particularly, § 24-3323.

Furthermore, in the **McConnell** case there was a real issue as to whether it was necessary under the Federal Rules of Civil Procedure for the attorney to pursue the questioning, which the judge had forbidden, in order to perfect his record for appeal.

The **McConnell** case was one of the exclusion of evidence which the trial judge had ruled inadmissible and the

contemnor's repeated attempt to ask questions relating thereto, and the contemnor's statement that he had the right to ask the questions and the trial judge could sustain an objection thereto and that he "propose to do so unless some bailiff stops" him. In the case sub judice there was no attempt to exclude the evidence but a question of the procedure to be followed in admitting the evidence. Here the contemnor attempted for the fourth time after the court ruled, and the State had rested, to recall the witness for further cross-examination, disregarding the court's repeated ruling that the witness could be called as a witness for the defendant.

The case of **Re Green**, 369 U. S. 689, 8 L. ed. 198, 82 Sup. Ct. 1114, must be distinguished from the case sub judice in that the alleged contemptuous acts in **Re Green** were not acts of misconduct that fall within the category of acts constituting contempt in facie curiae, where immediate punishment is necessary to prevent demoralization of the court's authority; in fact such acts were not committed in the presence of the court but pertained to the force and effect of an order of the court, whereas the contemptuous acts herein were committed in the presence of the court and related directly to the court's decorum and authority.

In the **Green** case the citation of contempt was issued without the alleged contemnor being given an opportunity to be heard. In the case sub judice, the petitioner was given ample opportunity to show cause why he should not be adjudged in contempt, and the petitioner refused to speak in explanation, mitigation or extenuation of his contemptuous conduct but stubbornly and defiantly spoke in resentment and defiance of the court, arguing only, that he was not in contempt of court.

In the **Green** case the contempt was based upon the attorney's construction of a court order and the authority

of that court to issue such an order. In the case sub judice there is only the question of the conduct of the attorney in refusing to adhere to the ruling and direction of the court in the exercise of the court's authority to control the proceedings therein.

Wood v. Georgia, 370 U. S. 375, 8 L. ed. 2d 569, 82 Sup. Ct. 1364, must be distinguished as being an exercise of contempt powers by the court on matters occurring outside of the presence of the court in that the alleged contemptuous acts were the uttering and publishing of certain statements regarding the court's charge to the grand jury. Furthermore, Wood was an elected official and had a right to enter into the field of political controversy, particularly where his political life was at stake. Furthermore, there was no express direction of the court concerning his conduct as is present in the case sub judice. This Court said in the **Wood** case that:

> "First, it is important to emphasize that this case does not represent a situation where an individual is on trial; there was no 'judicial proceeding pending' in the sense that prejudice might result to one litigant or the other by ill-considered misconduct aimed at influencing the outcome of a trial . . .

It was held by this Court that the contempt citation in the **Wood** case was the use of the contempt powers to control the free expression of an individual on matters of current public importance.

The case sub judice embodies no such exercise.

The contemptuous conduct of the petitioner was not the exercise of his constitutional grant of freedom of speech, but was the direct refusal to adhere to the ruling of the court; an attempt to override the ruling of the court; an effort to dictate to the court the manner in which the court

would conduct its business, none of which are found in the **Wood** case, where the alleged contemptuous conduct was the comments of an individual on motive behind a court's charge to the grand jury.

The case of **Fisher v. Pace**, 69 Sup. Ct. 425, 336 U. S. 155, cited by petitioner, very closely parallels the case at bar, although it involves the disobeying of an order of the trial court as to argument of counsel to a jury, whereas the petitioner here persisted in his demands to recall a witness for further cross-examination after repeated adverse rulings of the court and after being directed to proceed with his defense and call some other witness.

In **Fisher** this Court held at page 162:

> "In addition to this stubborn effort to bring excluded matter to the knowledge of the jury, the petitioner twice refused to heed the court's admonition not to argue the point. As the Supreme Court said, 'It was the duty and power of the trial judge in the trial of the compensation suit to determine the type, manner and character of the argument before the jury. Of course, his rulings thereon were subject to review in the appellate courts, but he has the power to make them whether right or wrong. If they are erroneous the injured party has the plain, simple and adequate remedy of appeal. It was thus the duty of counsel to abide by his decisions even if erroneous; and if any rights of his clients were violated the remedy was by exception and appeal. Any other procedure would result in mockery of our trial courts and would destroy every concept of orderly process in the administration of justice.' This judgment of the Supreme Court turned on their understanding of Texas law and practice. We see nothing in their opinion or conclusion that indicates any disregard of petitioner's rights."

CONCLUSION.

The rulings of the Court of Appeals of Georgia and the Supreme Court are based upon Georgia law, do not involve any federal question and are not contrary to public policies. All that is here involved is the exercise by a Georgia court of record of its duty to regulate and control the conduct of its officers in public trials to the end that order and decorum may be preserved in its proceedings and to the end that orderly justice may be preserved to the litigants before it. The questions presented are of paramount importance only because, as shown by the instant record, it becomes necessary for the court to utilize its contempt powers to curb the conduct of individuals before it, in its vigorous assertion of the duty to provide a fair and unprejudiced atmosphere for all litigants.

The record is clear that there was no undue exercise of power nor was there any attempt to prevent the attorney from asserting the rights of the defendant on trial to the fullest.

The court has the inherent power and duty to control the conduct of all business before it in a manner which best serves all parties and did nothing more than exercise its powers to perform its duty in this case.

The record in this case clearly shows conduct on the part of the petitioner that was in direct conflict with the orders and rulings of the trial judge, and that such acts of the petitioner were committed in open court in a public trial and were committed in the presence of the court. The record further shows that when given an opportunity to be heard as to why he should not be held in contempt of court, the petitioner chose not to offer any statement nor to explain his conduct, but chose to defiantly state that he was not in contempt of court.

For the reasons hereinbefore enumerated, it is respectfully submitted that the decisions of the Supreme Court of Georgia and the Georgia Court of Appeals in affirming the Judge of the City Court of Hall County are not in error, and it is respectfully requested that the relief sought by petitioner be denied.

Respectfully submitted.

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APPENDIX.

21923. CRUDUP v. THE STATE.

Quillian, Justice. This case arose out of the citation for contempt of an attorney, John N. Crudup, by the Judge of the City Court of Hall County. On grant of certiorari, we review the judgment of the Court of Appeals affirming the trial judge, **Crudup v. State**, 106 Ga. App. 833 (129 S. E. 2d 183).

The relevant facts as set out in the citation for contempt as stated by the trial judge are as follows: After counsel had, on numerous occasions, asked repetitious questions on cross-examination of the State's witnesses despite the admonition of the trial judge, the State rested. Whereupon counsel requested that a witness be recalled for the purpose of cross-examination as to a particular point. The judge ruled that the witness could not be recalled for cross-examination, but that he could be called as a witness for the defendant. Counsel stated he did not wish to call the witness for the defendant, "but wanted to recall him about his testimony while on the stand." The judge again ruled that the witness could not be recalled for the purpose stated and "directed Attorney Crudup to proceed with his defense and call some other witness." Counsel stated he had no other witness "except the defendant would make a statement," but that he wanted to put the witness in question back on the stand. The judge again stated to counsel that he could call the witness for the defendant, but could not recall him for further cross-examination to ask him what he testified to earlier in the trial. Counsel then again stated he did not want to call the witness as a witness for the defendant but persisted in his request to recall him for cross-examination as to his testimony given earlier in the trial. At this point, the judge asked counsel if he had any reason to give why he should not be punished for contempt of the court in failing and refusing to abide by the rulings of the court that

the witness could not be recalled for the purposes he was insisting on. Counsel replied that "he was not in contempt of court".

Held:

"The power to punish contempts is inherent in every court of record." **Bradley v. State**, 111 Ga. 168 (36 S. E. 630). See also **Plunkett v. Hamilton**, 136 Ga. 72 (70 S. E. 781); **Atlanta Newspapers v. State**, 216 Ga. 399, 402 (116 S. E. 2d 580). There is no question that every court has the power to preserve and enforce order in its immediate presence, and as near thereto as is necessary to prevent interruption, disturbance, or hindrance to its proceedings; that this includes the power to compel obedience to its judgments, orders and processes; and to control, in the furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto. **Code** § 24-104. See also **Code** § 24-105. Further, no attorney shall ever attempt to argue or explain a case, after having been fully heard, and the opinion of the court has been pronounced, on pain of being considered in contempt. **Code Ann.** § 24-3323 (formerly **Code** § 24-3306).

Upon a careful perusal of the record it is clearly shown that, after being directed by the trial judge to proceed with his defense and call some other witness, counsel instead continued to insist upon his request contrary to repeated adverse rulings by the court. Under such circumstances and mindful of the discretion granted to a trial judge in matters of contempt, we are constrained to the view that the trial judge's adjudication of contempt was not an enormous, flagrant or gross abuse of his discretion. **Cabot v. Yarborough**, 27 Ga. 476; **Remley v. DeWall**, 41 Ga. 466 (5); **Hayden v. Phinizy**, 67 Ga. 758 (2); **Salem v. State**, 101 Ga. App. 905 (1) (115 S. E. 2d 447). See also **Carson v. Ennis**, 146 Ga. 726, 728 (1) (92

S. E. 221, L. R. A. 1917E 650); **Garland v. State**, 101 Ga. App. 395, 401 (6), and the dissent at page 427 (114 S. E. 2d 176).

Judgment affirmed. All the Justices concur, except Duckworth, C. J., Head, P. J., and Candler, J., who dissent.

Argued February 11, 1963—Decided April 4, 1963—Rehearing Denied April 16, 1963.

Certiorari to the Court of Appeals of Georgia—106 Ga. App. 833 (129 S. E. 2d 183).

John Crudup, Robert E. Andrews, for plaintiff in error.

C. E. Smith, Jr., Solicitor, contra.

Duckworth, Chief Justice, dissenting. While the purported amendment of the contempt judgment contains extensive recitals of the conduct of the contemnor in repetitious cross-examination of the State's witnesses, and arguments of the judge that such conduct was very obnoxious to him, yet the specific matter upon which the contempt judgment is based is a request, repeated four times, couched in perfectly respectful and proper language, to be allowed to recall a State's witness and have him say whether or not he had testified that there was a woman in the car, and to each of such requests the judge said he could recall the witness but he would have to adopt him as a defense witness. I wonder, with all other matters recounted by the judge, just what he asked the attorney to speak about when he asked if he wished to show why he should not be punished for contempt? Was he intending that the attorney account for his conduct throughout the trial? While summary punishment for contempt in the presence of the court is permissible, this does not authorize a judgment for contempt without specifying

the grounds thereof. The judge's order recites that the matter sought to be asked the witness was irrelevant, yet his same order recites that he authorized counsel to recall the witness for the sole purpose of asking him about it, provided only he pay the stated price thereof of adopting a deputy sheriff, a State's witness, as the witness of the accused. These recitals preclude any claims that the reason for denying the request was that the testimony would have been irrelevant. Then in the face of the indisputable fact that this was a criminal case where the defendant pleads nothing but "not guilty," and the recited fact that the defendant had offered no evidence, the judge asserts that neither the State nor the accused contended that there was a woman in the car. Where did the judge discover the contentions of the accused when to this point he had made none except "not guilty"? These recitals of the judge show unmistakably his unfairness to the attorney. The admitted fact that the solicitor stated in the hearing of the judge and jury that the witness had not so testified, and counsel for the accused replied that he had so testified, vividly demonstrated to the judge that there was disagreement as to the witness' testimony. If the court was conducted as all courts should be, its sole object was to discover the truth from the purest sources. **Code** § 38-101. The only pure source here was the witness himself. Since the judge had allowed the solicitor to violate the law by stating what the witness had not said, apparently without thinking of holding him in contempt, counsel for the accused would not have been counsel for the accused as required by the Constitutions, State and Federal, had he not insisted, until ordered to desist, upon protecting his client against the injury inflicted by the solicitor.

It is apparent that the contempt judgment was based upon alleged prevention of the orderly dispatch of court business. A second thought, as shown by the attempted

amendment, was to charge him with violating Rule 23, found in **Code Ann.** § 24-3323. The first charge is obviously groundless since requests for permission to call a witness are proper and necessary parts of a trial. And the second is invalid because, first, by his repeated replies to the request, the judge had authorized the repeated requests, hence, they were made with the court's permission, and in the second place, what the attorney did was not an "attempt to argue or explain a case," which are only acts specified by the rule as constituting grounds for contempt. What he did was neither argument nor explanation. It was an humble request. The judge recites that he failed to purge himself of contempt, yet the record shows conclusively that he had not been adjudged in contempt, and no act of his had been specified as contemptuous. Counsel did nothing that the court had ordered him not to do. The solitary portion of the request that was denied was that the witness be on cross-examination. The judge's refusal was never violated. In this part of the request the attorney was clearly within the right granted by law. In **Long v. State**, 12 Ga. 293, at pages 330, 331, this court speaking through one of its ablest Justices, Justice Nesbit, said: "Yet it is certainly the business of court, when practicable, to correct the misrepresentations of the testimony by counsel, particularly when that counsel is in conclusion. And it is practicable, when the witness whose evidence is charged to be misrepresented, is in Court. He ought to be called to say what he did testify." Here counsel for the accused charged that the solicitor had misrepresented the evidence of a witness who was in court. The request of counsel for the accused was that he be called to say what he did testify. Instead of being granted as Judge Nesbit said should be done, it was, because of its repetition, made the sole ground for punishing counsel for contempt. How far can justice change?

I happen to know Judge Blackshear, and know him to be a capable and honorable judge, but even so, he is human, and subject, as we all are, to err. My very severe criticism of this contempt judgment is not intended in any way, even by implication, to reflect unfavorably upon the personal, professional or official character of the judge, but only to say that in this case he was in my opinion "trigger happy" to throw his judicial weight against a highly respectful lawyer and thereby unjustly humiliate him and place a black mark upon his honorable professional record. For this court to affirm that judgment is an open invitation to tyrannical judges to shackle the legal profession and thereby deny litigants the benefit of counsel.

During the more than 24 years I have served here, the Supreme Court has never punished a single lawyer for contempt, and the same lawyers that practice before the Supreme Court practice before the trial courts. Power to punish for contempt is essential and should be exercised in all cases where necessary, but it is not a power that should be carelessly exercised, or to intimidate lawyers in the discharge of their important duties. I hope the bare majority of 4 to 3 that rendered this judgment will eventually change, and a decision can be rendered by this court making it clear that every judge does not have the authority to arbitrarily punish a lawyer every time he chooses without substantial facts showing a necessity therefor in order that the court's business might be conducted orderly and without unwarranted interference.

I am authorized to state that Mr. Justice Candler concurs in this dissent.

39545. CRUDUP v. STATE OF GEORGIA.

When an attorney fails to yield after three rulings of the trial judge adverse to him on the question of recalling a witness for further cross-examination, and insists for the third time on recalling such witness, this court cannot say that the trial judge's adjudication of contempt was a gross, enormous, or flagrant abuse of discretion.

Decided September 27, 1962—
Rehearing Denied November 8, 1962.

Contempt of court. Hall City Court. Before Judge Blackshear.

This is an appeal from an order of the trial judge adjudicating the plaintiff in error in contempt of court. It states in part: "John N. Crudup, the defendant's attorney, then called to a court bailiff to bring in Deputy Sheriff Fuller. The court inquired of attorney Crudup if he overlooked something when witness Fuller was on the witness stand and attorney Crudup stated that he wanted to recall witness Fuller and ask him if he didn't testify that a woman was in the car with the defendant at the time of the occurrence. The court **ruled** that witness Fuller could not be recalled for such further cross-examination and that the jury would know what he testified but the witness could be called as a witness for the defendant. Attorney Crudup **stated** he did not want to call witness Fuller as a witness for the defendant but wanted to recall him about his testimony while on the stand. The court **again ruled** that witness Fuller could not be recalled for the purpose stated and **directed attorney Crudup to proceed with his defense and call some other witness.** Attorney Crudup **stated** he had no other witness except the defendant would make a statement but that he wanted to put the witness Fuller back on

the stand. The court **again stated** to attorney Crudup that he could call witness Fuller to the stand to testify as a witness for the defendant but could not recall him for further cross-examination to ask him what he testified to earlier in the trial. Attorney Crudup then **again stated** he did not want to call witness Fuller as a witness for the defendant but persisted in his request to recall him for cross-examination as to his testimony given earlier in the trial and if he didn't testify that a woman was in the car at the time of the occurrence" (Emphasis supplied). "At this point the court asked attorney John N. Crudup if he had any reason to give why he should not be punished for contempt of the court **in failing and refusing to abide by the rulings of the court** that the witness could not be recalled for the purposes he was insisting on; Attorney John N. Crudup thereupon replied to the court that he was not in contempt of the court. Attorney John N Crudup having thus **failed and refused to abide by the rulings of the court** that witness Fuller could not be recalled for further cross-examination regarding matters to which he had or had not testified earlier in the case, and **having refused to abide by the court's ruling** that the jury would remember the evidence, and attorney John N. Crudup **having persisted repeatedly in refusing to abide by the rulings of the court** and insisting on recalling the witness for the purposes aforesaid, and the attorney's conduct being repeated and the attorney John N. Crudup having failed and refused to purge the contempt after opportunity to do so, and said attorney having stated to the court that he was not in contempt after having been so adjudged, the court now in the exercise of a sound judicial discretion does consider, order, and adjudge that John N. Crudup an attorney at law, has wilfully and intentionally conducted himself in contempt of the court and in defiance of the court, and that it is necessary in order to carry on the admin-

istration of justice, **preserve order and decorum** in the court and **to enforce due respect to the court's orders and rulings** . . . " (Emhasis supplied).

John N. Crudup, Robert E. Andrews, for plaintiff in error.

C. E. Smith, Jr., Solicitor, contra.

Hall, Judge. 1. In **Garland v. State of Ga.,** 99 Ga. App. 826, 832 (110 S. E. 2d 143), this court held that a judgment of contempt must contain "factual holdings setting out the misconduct on the part of the attorney such as will disclose to a reviewing court the subject matter upon which the discretion of the trial court operated." The judgment in this case meets that test.

2. The reconciliation between an attorney's duty to mainfain respect due the courts[1] and his duty to protect and advance the interests of his client[2] may prove to be

[1] Canon 1, The Canons of Professional Ethics of the American Bar Association, states: "It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of temporary incumbent of the judicial office, but for the maintenance of its supreme importance." Adopted by the Georgia Bar Association, May 20, 1947. Report, Georgia Bar Association, 1947, pp. 51, 151, 328.

[2] Canon 15, The Canons of Professional Ethics of the American Bar Association states: "The lawyer owes entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability, to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane.

at times difficult. Nevertheless, it is basic that even as to laymen ignorance of the law is no excuse. **Code** § 102-105. Surely this applies with even greater force to an attorney who is a member of one of the three "learned professions." Accord, **Georgia State Bd. of Examiners in Optometry v. Friedman's Jewelers, Inc.**, 183 Ga. 669, 673 (189 S. E. 238). Few cases are found adjudicating the question of contempt by an attorney in disobeying the rulings of the court. We believe this indicates that generally lawyers and judges accord great respect to the authority, duties, and rights of each other and the vital role of each in the judicial process.

The act establishing the City Court of Hall County (Ga. L. 1890-91, p. 939, as amended by Ga. L. 1916, pp. 225, 228), provided that the court shall be a court of record, have the same rules of procedure and practice as the superior courts of the State unless otherwise provided in the act, and that the judge shall have the same power to enforce his orders, to preserve order, to punish for contempt and to enforce all his judgments as is vested by law in the judges of the superior courts of the State.

Code § 24-104 provides: "Every court has power — 1. To preserve and enforce order in its immediate presence, and as near thereto as is necessary to prevent interruption, disturbance, or hindrance to its proceedings. . . . 3. To compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding therein. . . . 4. To control, in furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto." The power to punish con-

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He must obey his own conscience and not that of his client." Adopted by the Georgia Bar Association, May 25, 1947. Report, Georgia Bar Association, 1947, pp. 51, 151, 332.

tempts is inherent in every court of record (**Atlanta Newspapers, Inc. v. State of Ga.**, 246 Ga. 339 (1), 116 S. E. 2d 589) and, under **Code** § 24-104, "every court, whether a court of record or not, has power to punish for contempt committed in its immediate presence." **Plunkett v. Hamilton**, 136 Ga. 72 (1) (70 S. E. 781, 35 L. R. A. (N. S.) 583, Ann. Cas. 1912B, 1259); **Brooks v. Sturdivant**, 177 Ga. 514, 516 (170 S. E. 369); **Watson v. Dampier**, 148 Ga. 588 (1) (97 S. E. 519); Rapalje, Contempt, p. 1.[3] Rule 23 of the Rules of the Superior Courts (**Code** § 24-3323) specifically provides: "No attorney shall ever attempt to argue or explain a case, after having been fully heard, and the opinion of the court has been pronounced, on pain of being considered in contempt." Accord, 17 C. J. S. 35, § 25 (b). "The majesty of the law must be maintained; its mandates must be implicitly obeyed." **Mays v. Willingham**, 37 Ga. App. 478, 480 (140 S. E. 789).

Contempt of court has been variously defined; in its broad sense it means disregard for or disobedience of the order or command of the court "but "it also includes the interruption of the proceedings. . . ." 12 Am. Jur. 389, Contempt, § 2. Contempt of court, as a punishable offense, is as old as the courts themselves. 4 Blackstone's Commentaries 284. This is especially true in the case of criminal contempt where the court exercises a disciplinary and summary jurisdiction over attorneys and other officers of

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[3] We start with the premise that the right of courts to conduct their business in an untrammeled way lies at the foundation of our system of government and that courts necessarily must possess the means of punishing for contempt when conduct tends directly to prevent the discharge of their functions." Wood v. Georgia, 370 U. S. 375, 383.

[4] Rule 23 (*Code* § 24-3323) was present in the Code of 1910 as § 6265, was incorporated in the amendment of 1910 (Ga. L. 1910, pp. 225, 228) to the act establishing the City Court of Hall County and is applicable in the present case. *Chance v. State*, 97 Ga. 346 (23 S. E. 832).

justice. Fox, History of Contempt of Court 3, 156-157.[5] Care must be taken however to distinguish between cases of contempt in facie curiae and those involving an out-of-court statement. The latter involves the constitutionally guaranteed liberty of free expression and the power of courts to punish for such contempts is limited to cases in which there is a "clear and present danger to the administration of justice." **McGill v. State of Ga.**, 209 Ga. 500, 504 (74 S. E. 2d 78); Wood v. Georgia, 370 U. S. 375 (82 S. C. 1364, 8 L. E. 2d 569); Bridges v. California, 314 U. S. 252 (62 S. C. 190, 86 L. E. 192); Pennekamp v. Florida, 328 U. S. 331 (66 S. C. 1029, 90 L. E. 1295); Craig v. Harney, 331 U. S. 367 (67 S. C. 1249, 91 L. E. 1546). The former involves the inherent power of courts "to maintain order in their courtrooms and to assure litigants a fair trial . . ." Wood v. Georgia, 370 U. S. 375, 383, supra. It "is absolutely essential to the protection of the courts in the discharge of their functions." **White v. George**, 195 Ga. 465, 470 (24 S. E. 2d 787). "As an incident to their being, courts must have the authority 'necessary in a strict sense'[6] to enable them to go on with their work. In doing their work, courts, like others, may encounter obstructions. They must, therefore, be vested with incidental powers of self-protection. . . . Some action is necessary to enable the court to proceed with its affairs. . . . This manifestation of a court's activity is not a mystical emanation . . .: it is referable solely to the fact that a court has business at hand and must get on with it." Frankfurter and Landis, "The Power to Regulate Contempts", 37 Harvard Law Review, 1010, 1022. In summary, the interference with the immediate process of litigation may be treated by

[5] The twentieth Article of John's Magna Carta does not extend to officers of justice whose amercements are assessed by the Court and not by the jury."

[6] Holmes, J., in Craig v. Hecht, 263 U. S. 255, 280, 281 (44 S. C. 103, 68 L. E. 293).

the presiding judge as a facie curiae contempt. Ex parte Terry, 128 U. S. 289 (9 S. C. 77, 32 L. E. 405).

Questions of contempt are for the court treated with contempt, and the trial court's adjudication of contempt will not be interfered with unless there is a gross, enormous, or flagrant abuse of discretion. **Salem v. State of Ga.**, 101 Ga. App. 905 (1) (115 S. E. 2d 447); **Garland v. State of Ga.**, 101 Ga. App. 395, 401 (114 S. E. 2d 176); **Cabot v. Yarborough**, 27 Ga. 476; **Remley v. DeWall**, 41 Ga. 466; **Hayden v. Phinizy**, 67 Ga. 758; **Warner v. Martin**, 124 Ga. 387 (52 S. E. 446, 4 A. C. 180); **Mays v. Willingham**, 37 Ga. App. 478, supra.

The judgment here shows that the contemnor attempted to recall a witness for the purpose of further cross-examination and that upon ascertaining the purpose of such recall the trial judge **ruled** adversely to the contemnor on this point, but stated that the witness could be called as a witness for the contemnor's client. The contemnor **insisted** upon recalling the witness for the purpose of further cross-examination. The trial judge **again ruled** adversely to the contemnor on the same question **and directed him to proceed with his defense.** The contemnor **again insisted** upon recalling the witness. The trial judge **again ruled** for the **third time** adversely to the contemnor on the same question. The contemnor **again insisted** for the **third time** (after three previous rulings on the same question) upon recalling the witness. By virtue of the foregoing rules of law, and with specific reference to **Code** § 24-3323, and under the record in this case, we cannot say that the trial judge's adjudication of contempt was a gross, enormous or flagrant abuse of discretion. **Garland v. State of Ga.**, 101 Ga. App. 395, supra.[7]

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[7] Even the dissenting opinion (p. 421) in the *Garland* case concedes that "A lawyer is required by the rules of court to yield

The fact that the trial judge did not adjudicate the contemnor in contempt until after he had given him an opportunity to make a statement as to why he should not be held in contempt is of no consequence. Undoubtedly this delay was "a wise exercise of discretion . . . to allow the contemnor an opportunity to mitigate his offense by showing that no contempt was intended, or any other mitigating circumstances, except in cases where there would be no excuse for the action of the contemnor." **White v. George**, 195 Ga. 465, 470-471, supra; Ex parte Kearney, 7 Wheat. (20 U. S.) 38 (5 L. E. 391). "In all ordinary matters an advocate must, even more than ordinary persons, since he has a special privilege to practice law, conform himself to the usages of the Court and the rulings of the Judge." Oswald's Contempt of Court, pp. 54-55. Being an officer of the court, a member of a learned profession and fully cognizant of **Code** § 24-3323, the contemnor needed no specific warning to cease persisting in his argument in view of the three previous rulings of the court that the witness could not be recalled for further cross-examination. He needed no further protection for his client than an adequate record. Even if the trial judge was in error on his first ruling, it was the duty of counsel to abide by the first and subsequent rulings; and if any right of his client was violated, the remedy was by writ of error. "Any other procedure would result in mockery of our trial courts and would destroy every concept of orderly process in the administration of justice." Fisher v. Pace, 336 U. S. 155, 182 (69 S. C. 425, 93 L. E. 569).

We have not overlooked the case of In Re McConnell, 370 U. S. 230 (8 L. E. 2d 434). It is not controlling here for the reason that it merely involved the "exercise of" the Supreme Court of the United States' "supervisory

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without further argument, to any order or ruling of the judge in whose presence he is. Failure to do so is contempt."

power" over inferior Federal courts.[8] Furthermore it is distinguishable from the present question on several grounds.[8a]

It matters not what we individually might have done under the circumstances if we were sitting as the trial judge. The trial judge has a wide discretion in regulating and controlling the business of the court and the conduct of the trial. **Atlanta Newspapers, Inc. v. Grimes**, 216 Ga. 74 (114 S. E. 2d 421); **Bannister v. Hubbard**, 82 Ga. App. 813 (62 S. E. 2d 761); **Jackson v. Moultrie Production Credit Assn.**, 76 Ga. App. 768 (47 S. E. 2d 127). We have no discretion and must follow what Chief Justice Sir Edward Coke called the "straight mete-wand of the law."

We must also remember that ours is an adversary system and that the two opposing attorneys are partisan advocates. Confidence and power is reposed in the trial judge to administer the business of the court in a non-partisan manner. Such occurrences as we have in this case must be viewed as a unit in order to appraise properly the alleged misconduct. The relationship of the contemnor as an officer of the court must not be lost sight of and reliance must be placed upon the fairness and objectivity of the presiding judge." Fisher v. Pace, 336

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[8] a. The Federal courts have no statute similar to *Code* § 24-3323.

b. There being no similar statute, the contempt was based on the alleged improper language of the attorney as being an actual obstruction of justice.

c. It is clear from In Re McConnell that the inferior Federal courts, as distinguished from Georgia courts of record, are "limited, in contempt cases, to the least possible power adequate to the end proposed." P. 234.

d. There was a real issue in In Re McConnell as to whether it was necessary under the Federal Rules of Civil Procedure for the attorney to pursue the questioning which the judge had forbidden in order to perfect his record for appeal.

U. S. 155, 161, supra; accord, **Garland v. State of Ga.**, 101 Ga. App. 395, 416-417, supra. It is axiomatic that, if we do not uphold the trial judges in this State in the proper exercise of their discretionary power to control recalcitrant attorneys, they will control our trial judges.

Judgment affirmed. Carlisle, P. J., Bell, Frankum, Jordan, Eberhardt and Russell, JJ., concur. Felton, C. J., and Nichols, P. J., dissent.

Felton, Chief Judge, dissenting. I have no quarrel with the very fine and studious opinion prepared by Judge Hall except that I wish that we could store it away and use it in a case where it is applicable to the facts, as I do not think is the case here.

The original contempt order, and that is the only one mentioned in the opinion, does not allege one single thing which Mr. Crudup did which was in the slightest degree contumacious, or which tended in the remotest degree to obstruct the administration of justice. A mere reading of the order will prove this to be true. Mr. Crudup stated to the court three times what he wanted to do. The court, instead of telling Mr. Crudup not to make the statement again, kept on repeating what he had been saying and, when Mr. Crudup repeated himself the fourth time, one time less than the judge, the judge asked Mr. Crudup if he had any reason to give why he should not be punished for contempt and Mr. Crudup said he was not in contempt. The court construed his last statement as adjudging Mr. Crudup in contempt and ruled that Mr. Crudup refused to purge the contempt after opportunity to do so. There was no judgment of contempt until the written order and the record does not show any refusal by Mr. Crudup to purge himself after opportunity. The attorney did not violate any direction of the court. He did not disobey any order because he did not call the witness again to the

stand for the purpose of cross-examination after the judge ruled that he could not. I think that before the judge could hold Mr. Crudup in contempt he would have had to rule that he could not again make the request to call the witness for cross-examination. The court left the door open for two additional requests and I do not see how Mr. Crudup could have known the limit without the judge's first telling him. The rule of court embodied in Code § 24-3323 has no application to the facts of this case and so far as appears from the record the judge did not base his order on it in whole or in part. The McGill case (209 Ga. 500, supra) means, in my opinion, that the Federal rule is about the same as Georgia's, and a recent opinion of the U. S. Supreme Court fits this case like a glove. The case is: In the Matter of Criminal Contempt of Thomas C. McConnell, 370 U. S. 230, supra. The opinion is as follows: "Mr. Justice Black delivered the opinion of the Court. The petitioner Thomas C. McConnell, a lawyer, was summarily found guilty of contempt of court for statements made while representing the Parmelee Transportation Company in an antitrust suit for treble damages and an injunction. The complaint charged that a number of defendants had unlawfully conspired to destroy Parmelee's business by restraining and monopolizing trade in violation of the Sherman Act. Petitioner and his co-counsel, Lee A. Freeman, had done extensive pretrial preparation on the issue of conspiracy which was the heart of their case. At the very outset of the trial, however, the district judge on his own motion refused to permit counsel to try to prove their conspiracy charge, holding that they must first prove in a wholly separate trial that defendants' actions had resulted in an economic injury to the public—an erroneous holding since we have held that the right of recovery of a plaintiff in a treble damage antitrust case does not depend at all on proving an economic injury to the public.

"Cut off by the judge's erroneous ruling from trial of the basic issue of conspiracy and wishing to provide a record which would allow this ruling to be reviewed by the Court of Appeals, counsel for Parmelee asked counsel for defendants to stipulate that plaintiff would have introduced certain evidence of conspiracy had it been allowed to do so. Defense counsel refused to stipulate, however, insisting that Parmelee's counsel prepare their record by following the procedure set out in Rule 43 (c) of the Federal Rules of Civil Procedure, which requires that before an offer of proof is made questions upon which the offer is based must first be asked in the presence of the jury. Unwilling to risk dismissal of their appeal for failure to follow Rule 43 (c), Parmelee's counsel proceeded to produce and question witnesses in the presence of the jury in order to lay the proper foundation for their offers of proof of conspiracy. But during the process of this questioning the judge ordered it stopped and directed that any further offers of proof be made without first having asked questions of witnesses in the presence of the jury. This ruling placed Parmelee's counsel in quite a dilemma because defense counsel was still insisting that all offers of proof be made in strict compliance with Rule 43 (c) and there was no way of knowing with certainty whether the Court of Appeals would treat the trial court's order to dispense with questions before the jury as an excuse for failure to comply with the rule. Petitioner therefore not only sought to make clear to the court that he thought defense counsel's objection was 'right' but also repeatedly insisted that he be allowed to make his offers of proof in compliance with the Rule. Following the trial the judge charged petitioner and his co-counsel [illegible] in a number of specifications with being guilty of contemptuous conduct during the course of the trial. After separate hearings both lawyers were summarily found guilty by the trial judge on all specifications. Both appealed to the Court of

Appeals, which reversed all of Freeman's convictions, reversed two of petitioner McConnell's convictions, but, with Judge Duffy dissenting, sustained the conviction of petitioner on Specification 6—the specification based on petitioner's insistence that he be allowed to make offers of proof in compliance with Rule 43(c). Even as to this conviction, however, the Court of Appeals held that the jail sentence imposed by the trial judge should be reduced to a fine of $100. As in Offutt v. United States, the 'importance of assuring alert self-restraint in the exercise by district judges of the summary power for punishing contempt' prompted us to bring the case here.

"The statute under which petitioner was summarily convicted of contempt is 18 U. S. C. § 401, which provides that: 'A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other as—(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice . . .' This section is based on an Act passed in 1831 in order to correct serious abuses of the summary contempt power that had grown up and was intended as a 'drastic delimitation . . . of the broad undefined power of the inferior federal courts under the Act of 1789,' revealing 'a Congressional intent to safeguard Constitutional procedures by limiting courts, as Congress is limited in contempt cases, to "the least possible power adequate to the end proposed."' 'The exercise by federal courts of any broader contempt power than this,' we have said, 'would permit too great inroads on the procedural safeguards of the Bill of Rights, since contempts are summary in their nature, and leave determination of guilt to a judge rather than a jury.' And we held long ago, in Ex parte Hudgins, that while this statute undoubtedly shows a purpose to give courts summary powers to protect the administration of justice against immediate interruption of court business,

it also means that before the drastic procedures of the summary contempt power may be invoked to replace the protections of ordinary constitutional procedures there must be an actual obstruction of justice: 'An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted . . .' Thus the question in this case comes down to whether it can 'clearly be shown' on this record that the petitioner's statements while attempting to make his offers of proof actually obstructed the district judge in 'the performance of judicial duty.'

"The Court of Appeals answered this question by sustaining Specification 6 only on the basis of petitioner's last sentence in the colloquy set out in the specification. That specification reads: 'On April 27, 1960, in the presence and hearing of the jury, after the Court had instructed the attorneys for plaintiff to refrain from repeatedly asking questions on subjects which the Court had ruled was not admissible, in the presence of the jury as distinguished from an offer of proof outside the presence of the jury, the following occurred: "By Mr. McConnell: Now you are trying to tell us we can't ask these questions. We have a right to ask these questions, and until we are stopped from asking these questions we are going to ask them, because it is in our prerogative in doing it. By the Court: I am now stopping you from asking the questions about conversations with Mr. Cross, because I have ruled specifically, definitely and completely that it is not an issue in this case. By Mr. McConnell: We have a right to ask them. By the Court: You can offer proof on it. By Mr. McConnell: We have a right

to ask questions which we offer on this issue, and Your Honor can sustain their objection to them. **We don't have a right to read the answers, but we have a right to ask the questions, and we propose to do so unless some bailiff stops us.''** (Emphasis added.)

"The record shows that after this colloquy petitioner's co-counsel asked for a short recess, that following this recess petitioner did not continue to ask questions which the judge had forbidden and that in fact he did not ask any more such questions again throughout the remainder of the trial. We agree with Judge Duffy who dissented below that there was nothing in petitioner's conduct sufficiently disruptive of the trial court's business to be an obstruction of justice. It is true that petitioner stated that counsel had a right to ask questions that the judge did not want asked and that 'we propose to do so unless some bailiff stops us.' The fact remains, however, that the bailiff never had to interrupt the trial by arresting petitioner, for the simple reason that after this statement petitioner never did ask any more questions along the line which the judge had forbidden. And we cannot agree that a mere statement by a lawyer of his intention to press his legal contention until the court had a bailiff stop him can amount to an obstruction of justice that can be punished under the limited powers of summary contempt which Congress has granted to the federal courts. The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty. The petitioner created no such obstacle here.

"While we appreciate the necessity for a judge to have the power to protect himself from actual obstruction in the courtroom, or even from conduct so near to the court

as actually to obstruct justice, it is also essential to a fair administration of justice that lawyers be able to make honest, good-faith efforts to present their client's cases. An independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice. To preserve the kind of trials that our system envisages, Congress has limited the summary contempt power vested in courts to the least possible power adequate to prevent actual obstruction of justice, and we think that that power did not extend to this case. Reversed."

When Mr. Crudup presented his bill of exceptions for certification the judge insisted on his including therein facts not stated in the first order of contempt and thereafter amended his first order, nunc pro tunc, without hearing or notice, as follows: "For the record in this case to be complete and sufficient for review and to specify with particularity the conduct of John N. Crudup, attorney at law, constituting the contempt of court, the judgment of contempt pronounced during the trial on February 23, 1962, at the February 1962 term of court and entered nunc pro tunc on February 26, 1962, for February 23, 1962, is now, during the same February 1962 term of this court, amended to complete and specify the record as follows: 1. The matters and things set forth in the judgment of contempt of court in the case of The State of Georgia versus John N. Crudup entered nunc pro tunc, now February 26, 1962, for then February 23, 1962, transpired during the public trial of The State of Georgia versus Marion Smith, the defendant being represented by John N. Crudup, attorney at law, and that same occurred on February 23, 1962, during the present February 1962 term of this court, and in said public trial and before a jury of twelve men, spectators in the courtroom, officers and attorneys, and before the trial judge. 2. Witness Fuller did not testify during the trial that a woman was in the

car with the defendant at the time of the occurrence as contended by attorney John N. Crudup. Neither the State nor the defendant Marion Smith contended a woman was in the car with the defendant, and testimony on the subject was neither material nor relevant to any issue in the case and would neither have aided nor harmed anyone. The repeated insistence of attorney John N. Crudup to recall witness Fuller and ask him what he testified while on the stand and if he didn't testify earlier in the trial that [a] woman was in the car with the defendant at the time of the occurrence was in repeated disobedience, resentment and resistance to the opinion and ruling of the court previously announced and made, that the witness could not be recalled for cross-examination and that the jury would know what he testified, and was a contempt of court by arguing and quarreling with the trial judge after the opinion and ruling of the court had been pronounced, and after attorney Crudup had been fully heard, and all of which was known to attorney Crudup and of which he was made fully aware by the court. Such conduct of attorney John N. Crudup was contemptuous and knowingly, wilfully and intentionally done to interfere with and impede the trial and in disrespect to the court and the court's rulings. 3. Said misbehavior and contempt of court by attorney John N. Crudup made necessary that he be then and there adjudged in contempt of court and punished in order that the trial judge could control the judicial proceedings and protect those proceedings from disruption, interference and obstruction during the trial, and in order to maintain respect for the court. 4. Said contempt of court by John N. Crudup was committed in the immediate presence of the court and in the immediate presence of a jury of twelve men, court officers, and spectators, during a public trial and was such conduct as tended to hold the court up to public ridicule. All rulings of the court were made in the presence of and known to

attorney John N. Crudup; the judgment of contempt was made in his presence in the courtroom during the proceedings, the opportunity to purge himself of contempt was fully afforded him, and he declined to purge the contempt after opportunity. The court thereupon sentenced attorney John N. Crudup to pay a fine of ten dollars or serve three days in jail. This punishment was necessary and reasonable. Shortly thereafter and on the same day, February 23, 1962, attorney John N. Crudup came to the trial judge, stated he wanted to pay the ten dollar fine and asked if he could be granted time to go to his office to get the money. His request was granted but the following day it became known he did not pay the fine. Attorney Crudup was requested to appear in court and he advised the court he wished to make a supersedeas bond and asked if he would be permitted to do so. The court assured him the request would be granted, and the court advised him the judgment would be written up and that a record would be made for his appeal. 5. The judgment of contempt and punishment was necessary in the administration of justice and to maintain decorum and respect for the court and was used only in the exercise of a sound judicial discretion and only with the utmost sense of responsibility and circumspection. The trial judge afforded attorney John N. Crudup an opportunity to purge himself of contempt or to offer an explanation or extenuation of his misbehavior and contemptuous conduct. Although the contempt was knowingly, wilfully and intentionally committed in the immediate presence, sight, and hearing of the court, the trial judge nevertheless in the exercise of a sound judicial discretion and with the utmost sense of responsibility and circumspection inquired if he had any reason to give why he should not be punished for the contempt. Attorney Crudup refused to speak in explanation, mitigation or extenuation of his contemptuous conduct but stubbornly and defiantly spoke in resentment

and defiance of the court by arguing that he was not in contempt of the court. 6. The proceedings were not reported by a court stenographer but the facts, rulings, orders, decisions and proceedings recorded, reported and shown in the judgment of contempt signed nunc pro tunc February 26, 1962, for February 23, 1962, and the facts, rulings, order, decisions, and proceedings recorded, reported and shown herein, are all within the personal knowledge of the trial judge and are true. 7. The February 1962 term of the City Court of Hall County, Georgia, is still open and the record in this case is being completed during the same term the contempt proceedings occurred. This amendment of the judgment signed nunc pro tunc is dated and signed on March 24, 1962. /s/ Joseph H. Blackshear, Judge City Court, Hall County, Georgia."

The second order is null and void as the majority evidently considered it. The original contempt judgment is erroneous for the reasons stated. I dissent from the judgment of affirmance.

Nichols, P. J., concurs in the dissent.

The State of Georgia
vs.
John N. Crudup } M. D. No. 1044.

In the City Court of Hall County, Georgia.

JUDGMENT OF CONTEMPT.

Petitioner, the defendant in the above-captioned case, files this written petition with the Court to allow said petitioner to pay said fine and be released from custody.

I.

Petitioner shows that he was apprehended and arrested pursuant to an order of the Judge of City Court of Hall

County, Georgia, dated July 25, 1963, ordering his immediate apprehension and arrest and be confined in the Common Jail, Hall County, Georgia, for a period of three days.

2.

Petitioner shows that the sentence of the Court was to pay a fine of $10.00 or serve three days, and petitioner tenders herewith his fine and cost, together in the amount of $24.81 in order that he might be released from the Common Jail of Hall County, Georgia.

/s/ John N. Crudup.
John N. Crudup, Pro Se.

Filed in office this 25 day of July, 1963.

H. Grady Watson,
Clerk.

ORDER.

The petitioner is hereby ordered to be released from the Common Jail, Hall County, Georgia, upon payment of said fine, and this is a final adjudication of said proceedings.

This 25th day of July, 1963.

/s/ Joseph H. Blackshear,
Judge, City Court, Hall County, Georgia.

Min 19.

Page 180

Pd. $10.00 July 25th, 1963.

H. Grady Watson,
Clerk.

Filed in office this 25 day of July, 1963.

H. Grady Watson,
Clerk.

Georgia, Hall County.

I, H. Grady Watson, Clerk, City Court of Hall County, Georgia, do hereby certify that the foregoing two (2) pages constitutes a true, correct and exact copy of a petition filed in said Court on the 25th day of July, 1963, and the order of the Court thereon, as the same appears of file and of record in my office.

I do further certify that the fine therein referred to was the fine imposed on John N. Crudup by the Judge of said Court on February 23, 1962, for contempt of said Court.

I do further certify that said fine was paid to me as clerk of said court on July 25, 1963, by the said John N. Crudup.

In witness whereof I have hereunto set my hand and the seal of said Court this 1st day of August, 1963.

H. Grady Watson,
H. Grady Watson,
Clerk, City Court of Hall County,
Georgia.